

N.D.A.G. Letter to Hanson (Sep. 12, 1988)

September 12, 1988

Honorable Lyle Hanson
Representative
337 15th Avenue NE
Jamestown, ND 58401

Dear Representative Hanson:

Thank you for your letter of August 10, 1988, in which you request my opinion concerning several questions raised by your constituent, Gary L. Pearson, D.V.M.

Many of the questions raised are answered by rules the State Game and Fish Commissioner and the State Engineer recently adopted. Those rules will become effective on October 1, 1988. Other questions are addressed by specific statutes. I have shared your letter with the State Engineer to gain further information concerning these topics.

Your first question concerns the date after which the acreages of all wetlands drained must be charged as a debit against the wetlands bank acreage credit balance. N.D.C.C. § 61-32-05 provides that "[t]he acreages of all wetlands drained after January 1, 1987, except those projects for which permits were applied for prior to January 1, 1987, must be charged as a debit against acreage credit balances."

Your second question concerns the manner in which the State Engineer will identify wetland drainage occurring after January 1, 1987, when permit applications for the drainage area are involved. This question is somewhat ambiguous. If the question concerns how wetland drainage is to be identified, the response from the State Engineer is that appointees of the Game and Fish Commissioner and the State Engineer will review the application area and determine if there is wetland drainage. One would presume that there is wetland drainage for every permit application. Otherwise, there would be no need for a permit.

On the other hand, if this question concerns the determination of the amount to be debited to the wetlands bank, N.D. Admin Code ch. 89-02-03, effective October 1, 1988, sets forth the procedure for this determination. A copy of all of the drainage rules, including this particular chapter, is enclosed for your review.

Your third question concerns how the State Engineer will identify wetland drainage occurring after January 1, 1987, when no permit applications for the drainage are involved. Again, this question is somewhat ambiguous. If the question concerns how wetland drainage will be identified where no permit applications are made, presumably appointees of the Game and Fish Commissioner and the State Engineer will review any reports or complaints received and determine if wetland drainage is occurring.

On the other hand, if this question concerns the manner in which the amount to be debited to the wetlands bank is calculated, N.D. Admin. Code § 89-02-03-15, effective October 1, 1988, provides the answer to the question. That section states that debits shall be determined in accordance with N.D. Admin. Code § 89-02-03-04 and shall include both authorized and unauthorized drainage.

Your fourth question inquires how many acres of wetland drainage have been debited to the wetlands bank where the effective date is January 1, 1987. Because the administrative rules do not take effect until October 1, 1988, there have been no debits or credits to the wetlands bank.

Nonetheless, my correspondence with the State Engineer indicates that the State Engineer's office did track all permit applications for drainage and is prepared to begin evaluation of those applications with the Game and Fish Department once the rules are effective. The tentative number of debits determined under this tracking system to the bank at present is approximately 50 acres. For your information, the State Engineer also tracked all credits to the bank in the same manner. Those credits will also be determined pursuant to N.D. Admin. Code ch. 89-02-03.

Your fifth question asks whether it is the State Engineer's interpretation that, under section 6, all wetlands drained after January 1, 1987, must be charged as a debit to the wetlands bank acreage balance, regardless of whether a permit was required for this drainage. I cannot speak on behalf the State Engineer and cannot indicate to you his interpretation of this matter. However, as Attorney General, it is my opinion that under section 6, the "acreages of all wetlands drained after January 1, 1987, except those projects for which permits were applied for prior to January 1, 1987, must be charged as a debit against acreage credit balances." N.D.C.C. § 61-32-05.

Your sixth question asks whether wetlands and watersheds of less than 80 acres may be charged as debits to the wetlands bank acreage balance when they are drained. Wetlands in watersheds of less than 80 acres for which no drainage permit is required must be debited to the wetlands bank when they are reported to the State Engineer or the Game and Fish Commissioner.

Your seventh question asks whether it is the interpretation of the State Engineer that wetlands drained to projects constructed under the supervision of a state or federal agency for which mitigation is required as part of a project are exempt from the wetlands bank accounting requirements of section 6. Again, I cannot speak on behalf of the State Engineer. However, it is my opinion that wetlands which are drained during the development of projects constructed under the supervision of state or federal agencies where those projects require mitigation are exempt from the wetlands bank accounting requirements of section 6 of Senate Bill No. 2035 if the agency is identified by the State Engineer in N.D. Admin. Code § 89-02-02-05. That section provides that the U.S. Department of Agriculture, Soil Conservation Service Division, is exempt from projects constructed pursuant to the Watershed Protection and Flood Protection Act, the Bureau of

Reclamation is exempt for drainage that is part of the originally authorized Garrison Diversion project, and the North Dakota Highway Department is exempt from federal aid projects. Other federal and state agencies may also be effectively "exempt" if their mitigation requirements meet or exceed the standards set by the State Engineer in N.D. Admin. Code ch. 89-02-03.

Your eighth question inquires how the State Engineer proposes to implement and enforce the wetlands bank accounting and 2,500 acreage drainage limit provisions of section 6 of Senate Bill No. 2035. The law requires that both the State Engineer and the Game and Fish Commissioner must jointly establish a wetlands bank. N.D.C.C. § 61-32-05. They have done so in N.D. Admin. Code ch. 89-02-03. That chapter specifically sets out the procedures to be used by the State Engineer and the Game and Fish Commissioner.

Your ninth question asks how the State Engineer proposes to implement and enforce the wetlands bank accounting and 2,500 acres of drainage limit provisions of section 6 for the drainage of wetlands not involving drainage of statewide interdistrict significance, considering that only those drainage permit applications involving drainage of statewide or interdistrict significance require final approval by the State Engineer. N.D. Admin. Code ch. 89-02-02 provides that the State Engineer will make the determination of statewide or interdistrict significance after the board has made its determination whether or not a permit should be granted. Additionally, each permit applied for after July 1, 1989, is conditioned upon satisfaction of the replacement requirements as determined by the evaluation team pursuant to N.D. Admin. Code ch. 89-02-03.

Your tenth question inquires how the State Engineer proposes to monitor and enforce the wetlands bank accounting and 2,500 acre drainage limit provisions of section 6 in cases of unauthorized wetland drainage. Presumably the State Engineer will use the funding and personnel provided by the Legislature to enforce regulatory provisions required by the Legislature. In addition, each water resource board is required to enforce the drainage laws within its own particular jurisdiction. The State Engineer has also addressed enforcement issues by promulgating N.D. Admin. Code ch. 89-02-04 which establishes the procedure by which drainage complaint appeals are processed.

I hope this information is helpful to you.

Sincerely,

Nicholas J. Spaeth

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